Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-690

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Petitioner,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INC., a Delaware corporation; and RADIOEAR CORPORATION, a Delaware corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1978
CERTIORARI GRANTED JANUARY 8, 1979

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APPENDIX

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RELEVANT DOCKET ENTRIES

5-5-75—1—Filed COMPLAINT
Issued summons and 5 copies
Case assigned to Judge Larson, case card No. 449

5-28-75—6—Filed SUMMONS with Marshal's return of service on 5-6-75, 5-7-75, 5-13-75 & 5-15-75.

6-26-75—9—Filed deft. DAHLBERG ELECTRONICS, INC.'S ANSWER with affidavit of serv. by mail on 6-26-75.

6-27-75—10—Filed separate ANSWER OF DEFT. RADIOEAR CORPORATION to complaint with aff. of serv. by mail on 6-26-75.

1-26-76—18—ANSWER OF SONOTONE CORPORATION.

3-15-76—19—MEMORANDUM ORDER (Larson, J) that defendant's motions to quash and for dismissal on the grounds of absence of personal jurisdiction and improper venue be denied.

5-11-76—25—ANSWER OF BELTONE ELECTRONICS CORPORATION.

10-26-76—27—ANSWER OF TEXTRON INC.

12-29-76—30—NOTICE AND MOTION OF TEXTRON INC., RADIOEAR CORP., BELTONE ELECTRONICS CORP. AND DAHLBERG ELECTRONICS, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT, ret. 2-1-77 at 9:00 a.m.

2-1-77—33—MINUTES OF PROCEEDINGS (Larson, J) (Stafford, R) motion of Beltone, Dahlberg, Textron & Radioear for judgment on the pleadings or for summary judgment, argued, submitted & taken under advisement.

2-4-77—34—REPORTER'S TRANSCRIPT OF PROCEEDINGS (Larson, J) (Stafford, R) for 2-1-77. (Separate).

3-31-77—36—MEMORANDUM ORDER (Larson, J) that defendants' motions for dismissal or, in the alternative, for summary judgment be, and hereby are, denied.

5-2-77—38—NOTICE OF MOTION AND MOTION of Textron, Inc, Radioear Corporation, Beltone Electronics Corporation, and Dahlberg Electronics, Inc. for an order for entry of an amendment to its Order of March 31, 1977, so as to certify said Order for an immediate appeal to the Court of Appeals for the Eighth Circuit, ret. 5-10-77 at 8:45 a.m.

5-10-77—39—MINUTES OF PROCEEDINGS (Larson, J) (Stafford, R) motion of all defts. (except Sonotone) for certification of 3-31-77 Order for appeal to 8th Circuit, argued, submitted & taken under advisement.

5-10-77—40—AMENDED ORDER (Larson, J) that all further proceedings in this matter, including discovery, shall be stayed, pending the disposition by the Court of Appeals of defendants' appeal from this Order.

5-31-77—42—REPORTER'S TRANSCRIPT OF PROCEEDINGS (Larson, J) (Stafford, R) for 5-10-77 (Separate).

6-20-77—44—CERTIFIED COPY OF ORDER FROM THE EIGHTH CIRCUIT COURT OF APPEAL that application for leave to take interlocutory appeal has been considered by the court and is granted.

10-4-78—49—CERTIFIED COPY OF OPINION FROM THE EIGHTH CIRCUIT COURT OF APPEALS.

RULINGS OF THE LOWER COURTS

The opinion of the United States District Court for the District of Minnesota is reported at 435 F.Supp. 933 and is reprinted in the Petition for Writ of Certiorari at page A-2. The District Court's Amended Order is reprinted in the Petition at page A-1.

The opinion and the Order denying Petition for Rehearing en banc of the United States Court of Appeals for the Eighth Circuit are reported at 579 F.2d 1077 and are reprinted in the Petition at pages A-12 and A-31, respectively.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

KATHLEEN R. REITER, individually and as representative of the Class of All Personal Users of Hearing Aids located in the United States,

Plaintiffs,

vs.

SONOTONE CORPORATION, a New York corporation; BELTONE ELECTRONICS CORPORATION, an Illinois corporation; DAHLBERG ELECTRONICS, INC., a Minnesota corporation; TEXTRON INCORPORATED, a Delaware corporation and RADIOEAR CORPORATION, a Delaware corporation,

Defendants.

COMPLAINT
ANTITRUST CONSUMER CLASS ACTION
Civil No. CIV. 4-75-206

The plaintiff, by her attorneys, for her complaint against defendants, demanding a trial by jury respectfully alleges:

DEFINITION

1. As used herein, "hearing aid" means all products ordinarily manufactured and/or sold by hearing aid manufacturers, including defendants herein, for personal use.

JURISDICTION AND VENUE

2. This Complaint is filed and jurisdiction of this Court is invoked pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) to recover treble damages sustained by plaintiff and other members

of the class represented by her, and injunctive relief if appropriate by reason of the violations by defendants of Section 1 of the Sherman Act (15 U.S.C. 1).

3. Each of the defendants either transacts business or is found within the District of Minnesota, or the effects of the illegal activities alleged herein were felt in said district.

PLAINTIFF AND CLASS

4. Plaintiff is an individual residing in Richfield, Minnesota, who purchased two hearing aids during the year 1973.

5. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on her behalf and as representative of a class. The class consists of all persons in the United States or any sub part thereof who directly or indirectly purchased, at prices affected by the activities complained of, hearing aids.

6. Said class members are in a similar position to that alleged herein by plaintiff, and are members of a class so numerous that joinder of all parties is impracticable.

7. The rights of said class members, including plaintiff, involve common questions of law and fact which predominate over any questions affecting only individual class members, and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

8. The claims of plaintiff are typical of those to be asserted for the class, and plaintiff will fairly and adequately protect the interests of the class.

DEFENDANTS

9. BELTONE ELECTRONICS CORPORATION (hereinafter "Beltone") is named a defendant herein. Beltone is a corporation organized under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Beltone has manufactured hearing aids since 1941. In 1970, Beltone had sales of hearing aid products in excess of ten million ($10,000,000.00) Dollars, more than any other seller of hearing aids in the United States, representing approximately twenty per cent (20%) of the hearing aid market.

10. DAHLBERG ELECTRONICS, INC. (hereinafter "Dahlberg") is named a defendant herein. Dahlberg is a corporation organized under the laws of the State of Minnesota, with its principal place of business in Minneapolis, Minnesota. Dahlberg and its corporate predecessors have manufactured hearing aids since 1949. In 1970, Dahlberg was the third largest hearing aid manufacturer with sales in excess of four million ($4,000,000.00) dollars, representing approximately eight per cent (8%) of the hearing aid market.

11. SONOTONE CORPORATION (hereinafter "Sonotone") is named a defendant herein. Sonotone is a corporation organized under the laws of the State of New York, with its principal place of business in Elmsford, New York. Sonotone has manufactured hearing aids since 1929. In 1970, Sonotone was the fifth largest hearing aid manufacturer in the United States, with sales in excess of three million $3,000,000.00) dollars, representing approximately six per cent (6%) of the hearing aid market.

12. TEXTRON, INC. (hereinafter "Textron") is named a defendant herein. Textron is a corporation organized under the laws of the State of Delaware, with its principal place of business in Providence, Rhode Island. Maico Hearing Instruments (hereinafter "Maico") is, and has been since 1966, an unincorporated division of Textron, with its principal place of business in Minneapolis, Minnesota. Maico was the fourth largest hearing aid manufacturer in the United States, with sales in excess of three million ($3,000,000.00) dollars representing more than six per cent of the hearing aid market.

13. RADIOEAR CORPORATION (hereinafter "Radioear") is named a defendant herein. Radioear is a corporation incorporated under the laws of the State of Delaware, with its principal place of business at Coanosburg, Pennsylvania. Radioear has manufactured hearing aids since 1924. In 1970, Radioear was the seventh largest hearing aid mnaufacturer in the United States with the sales in excess of two million ($2,000,000.00) dollars, representing approximately four per cent (4%) of the hearing aid market.

CO-CONSPIRATORS

14. Various corporations, firms and individuals not made defendants in this complaint participated as co-conspirators in the violations alleged herein, and performed acts and made statements in furtherance thereof.

NATURE OF TRADE AND COMMERCE

15. Defendants are now and for some time have engaged in the business of manufacturing, distributing, selling and repairing hearing aids in various states of the United States and in foreign countries. Defendants distribute and sell hearing aid products to selected retail dealers located throughout the United States, who then resell to the general public. Wholesalers are rarely used in the distribution process.

16. In the course and conduct of their businesses, defendants ship or cause to be shipped, from their respective facilities located in their principal place of businesses aforementioned, in a continuous and uninterrupted flow of interstate commerce, hearing aids to selected retail dealers throughout the United States.

17. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to fifty million ($50,000,000.00) dollars at the

manufacturers' prices, and an estimated $175 million at retail prices.

In 1970, approximately fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

18. The success of the established hearing aid manufacturers, including defendants, in selling their products is based primarily on their ability to secure the services of retail dealers to sell their products to the hearing handicapped. Similarly, new entrants in the market to be successful must secure distribution through established dealers.

19. Approximately sixty per cent (60%) of the retail sales of hearing aids occur as a result of initial, direct contact between the hearing aid dealer and the hearing handicapped while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from the use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Inasmuch as the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is approximately $100.00 the average retail price is approximately $350.00. Over fifty per cent (50%) of the persons with hearing impairment who purchase hearing aids are over sixty five years of age.

OFFENSES CHARGED

20. Beginning at a time unknown to plaintiff, and continuing up to and including the date of the filing of this Complaint, the defendants and other persons acting for each of them, have been and are now engaged in:

A. A continuing combination and conspiracy to restrain interstate and foreign commerce of the United States in hearing aids in violation of Section 1 of the Sherman Act;

B. A continuing combination and conspiracy to monopolize and a combination and conspiracy to attempt to monopolize interstate and foreign commerce of the United States in hearing aids in violation of Section 2 of the Sherman Act.; and

C. Leases, sales and contracts relating to the interstate commerce of the United States in hearing aids in violation of Section 3 of the Clayton Act.

21. Each act of defendants and co-conspirators herein alleged was done in furtherance of the offenses charged in the preceding paragraph, was a part thereof and was done with the primary purpose and intent of restraining, monopolizing, attempting to monopolize and substantially lessening competition in the trade and commerce described herein. It was the intent, jointly and severally, of defendants and co-conspirators, *inter alia*, to:

A. Eliminate competition in hearing aids in the United States;

B. Use their monopoly power in hearing aids to eliminate competition;

C. Combine their economic power to eliminate competition in hearing aids; and

D. Obtain substantial and unconscionable profits for themselves, at the expense of plaintiffs, as a direct result of the restrictions upon competition in the trade and commerce herein alleged.

ACTS OF DEFENDANTS AND CO-CONSPIRATORS

22. In the course and conduct of its business of manufacturing, distributing, selling and repairing hearing aids, defendants have been and are presently pursuing the following courses of action:

A. Requiring their respective selected dealers to sell their respective hearing aids within assigned geographic areas;

B. Requiring their respective selected dealers to deal exclusively in their respective hearing aids;

C. Fixing, establishing, controlling and maintaining the retail prices at which their dealers sell their respective hearing aids;

D. Prohibiting their dealers from dealing with certain potential customers;

E. Prohibiting non-dealers from dealing in, or repairing their respective hearing aids.

F. Appropriating and using for their purposes the names and addresses of their dealer's customers.

23. In furtherance of these courses of action, defendants have been and are now engaged, *inter alia*, in the following acts and practices:

A. Distributing and selling their hearing aids directly to selected retail dealers, and refusing to deal with all other dealers;

B. Refusing to issue the express product warranties to consumers unless and until their dealers have reported the names and addresses of their customers to them;

C. Encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

D. Engaging in extensive national brand advertising of their hearing aids;

E. Causing their dealers' retail prices for hearing aids to be set at more than 300% above the manufacturers' prices as to the dealers;

F. Selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers;

G. Entering into agreements or understandings with their respective dealers, which agreements, *inter alia*, either expressly or by implication:

1. Establish restrictive territories within which the dealers may advertise and sell their products;

2. Require exclusive dealing in defendants' products;

3. Assign sale or purchase quotas to be met by their dealers;

4. Encourage or require the use of the manufacturers' brand name in the dealers' trade styles;

5. Restrict the classes of customers with whom their dealers may deal;

6. Require their dealers to submit the names and addresses of their customers to the defendants;

7. Permit the defendants to terminate such agreements without cause upon thirty days notice; and

8. In the event of such termination, permit the defendants to repurchase the terminated dealers' products purchased from such defendants.

H. Expressing, communicating or emphasizing to their selected dealers their business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, *inter alia*, persuasion, pressure, harassment, coer-

cion, or intimidation of such dealers to sell only defendants' products, and not to sell other brands.

24. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

EFFECTS OF OFFENSES

25. The acts and practices of defendants enumerated in paragraphs 22 and 23, taken either individually or collectively, are oppressive, coercive, unfair and anti-competitive, and have the tendency and capacity of hindering, suppressing or eliminating competition. The intended and actual effects of the offenses heretofore alleged were and are that defendants and co-conspirators:

A. Hindered and suppressed competition between defendants and other hearing aid manufacturers;

B. Eliminated competition among and between dealers dealing in defendants' hearing aids;

C. Deprived such dealers of their freedom to select their customers and otherwise to function as free and independent dealers;

D. Deprived such dealers of their ownership of, and freedom to maintain, confidential lists of their customers;

E. Hindered and suppressed competition among dealers dealing in defendants' hearing aids;

F. Deprived retail dealers of hearing aids of their freedom to act in the best interests of the hearing handicapped and their own business interests and pursuits;

G. Deprived consumers of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviations of their hearing impairment;

H. Deprived consumers of the benefits of free competition.

I. Deprived those engaged in the repairing or servicing of hearing aids in competition with defendants of their right to repair or service defendants' hearing aids;

J. Raised, fixed, stabilized and maintained at noncompetitive levels prices of hearing aids and equipment sold by defendant corporations and co-conspirators to plaintiff and members of the class;

K. Restricted and suppressed competition between and among defendants and co-conspirators, and deprived purchasers of aids and equipment, including plaintiff and members of the class, of the benefits of free and open competition.

L. Proximately damaged plaintiff and members of the class in their properties through having to pay a higher price for hearing aids and services than what they would otherwise have had to pay in a free competitive market place.

M. Plaintiff and members of the class have been and are presently being damaged by the effects of the defendants' offenses.

FRAUDULENT CONCEALMENT

26. At all times relevant hereto Plaintiff had no knowledge of the combination and conspiracy herein alleged or of any action that might have led to the discovery thereof until the filing of actions by the Federal Trade Commission on May 8, 1973. Plaintiff and the other members of the class she represents could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy and activities were concealed by the defendants through their adoption of elaborate schemes including the resort to secrecy to avoid detection.

PRAYER

WHEREFORE, Plaintiff prays that this Court Order adjudge and decree:

A. That Plaintiff and the class she represents have judgment against the defendants for three fold the amount of damages determined that have been sustained as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15);

B. That Plaintiff and the class she represents recover their costs of suit including reasonable attorneys' fees as provided by Section 4 of the Clayton Act (15 U.S.C. Sec. 15); and

C. That Plaintiff and the class she represents have such other and further relief, including injunctive, as the Court deems proper.

Dated: May 2nd, 1975.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DEFENDANT TEXTRON INC.

(Title omitted in printing)

Now comes the above named defendant, Textron Inc., by and through its attorneys, Robins, Davis & Lyons, and in answer to plaintiff's complaint says as follows:

1. States that paragraph 1 requires no answer.

2. Admits that the complaint purports to have been filed pursuant to the provisions of Sections 4 and 12 of the Clayton Act (15 U.S.C. 15, 22) and Sections 1331 and 1336 of Title 28, United States Code (28 U.S.C. 1331, 1337) but denies the remaining allegations of paragraph 2.

3. Admits that the Maico Hearing Instrument Division of Textron Inc. transacts business and is found within the District of Minnesota, but denies the remaining allegations in paragraph 3.

4. Denies the allegations of paragraphs 4, 5, 6, 7 and 8.

5. Alleges that it is without knowledge or information sufficient to form a belief as to the allegations of paragraphs 9, 10 and 11.

6. Alleges that it does not have sufficient information or knowledge to admit or to deny the figure set forth in paragraph 12 with respect to market share or rank. Admits the remaining allegations of paragraph 12.

7. Alleges that it is without knowledge or information sufficient to form a belief as to the allegations in paragraph 13.

8. Denies the allegations in paragraph 14.

9. With reference to the allegations set forth in paragraph 15, alleges that it is without sufficient information or knowledge to admit or to deny the allegations as to any defendant other than Textron. Textron avers that it has used and is using wholesalers in the distribution of hearing aids and admits the remaining allegations of paragraph 15.

10. Alleges that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 16 as to any defendants other than Textron. Textron admits the allegations in paragraph 16 except denies that its sales or

shipments are in a continuous and uninterrupted flow of interstate commerce.

11. Alleges that it is without sufficient information or knowledge to admit or to deny with respect to the term "substantial" as it is used in paragraph 17 and that it is without sufficient information to admit or to deny the reliability and accuracy of the figures set forth therein.

12. With reference to the allegations set forth in paragraph 18, admits that Textron, through the Maico Hearing Instrument Division, sells its product primarily to retail dealers who in turn sell to the public but denies the remaining allegations in paragraph 18 except to allege that it is without sufficient information or knowledge to admit or to deny the allegations set forth with respect to other manufacturers.

13. Alleges that it is without sufficient information or knowledge to admit or to deny the broad allegations of paragraph 19 as to the practices of manufacturers and dealers other than Textron, or as to the practices of medical doctors in hearing clinics. Textron further does not have sufficient information or knowledge to admit or to deny that over 50 percent of the persons with hearing impairment who purchase hearing aids are over 65 years of age. Textron denies all of the remaining allegations in paragraph 19.

14. Denies all the allegations in paragraph 20 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 20 as to the practices of other defendants.

15. Denies all the allegations in paragraph 21 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 21 as they relate to the intent of other defendants and co-conspirators.

16. Denies all the allegations in paragraph 22 as they relate to Textron. Textron states that it is without sufficient information or knowledge to admit or to deny the allegations in paragraph 22 as they relate to the courses of action of other defendants.

17. States that it is without sufficient information or knowledge to admit or to deny the allegations of paragraph 23 as they relate to the acts and practices of other defendants. As to the practices of Textron, Textron alleges as follows:

a. In reference to the allegations of paragraph 23A, Textron states that it does sell its hearing aids to selected retail dealers, factory-owned branch offices and distributors, and has chosen not to sell its products to all persons who have requested said products.

b. Admits the allegations set forth in paragraph 23B but alleges that it does honor claims within the warranty period even though the express product warranty has not been delivered to the ultimate customer.

c. Denies the allegations in paragraph 23C.

d. With reference to the allegations of paragraph 23D, Textron does not have sufficient information or knowledge to admit or deny with respect to the term "extensive" as used in this paragraph, but states that it does engage in limited national brand advertising of its hearing aids.

e. Denies the allegations of paragraph 23E.

f. Admits the allegations in paragraph 23F and states that this practice insures that the consumers of Textron hearing aid products will receive high quality repair service.

g. (1) Denies the allegations in paragraph 23G1.

(2) Denies the allegations in paragraph 23G2 and alleges that its dealers sell competitive hearing aids.

(3) Denies the allegations in paragraph 23G3 but states that it does from time to time have an incentive program which incourages dealers to meet certain reasonable sales objectives.

(4) Denies the allegation in paragraph 23G4 and alleges that its dealers can only use the manufacturer's brand name and the dealer style with Textron's written consent.

(5) Denies the allegations in paragraph 23G5.

(6) Denies the allegations in paragraph 23G6.

(7) Denies the allegations in paragraph 23G7.

(8) Admits the allegation of paragraph 23G8 with respect to the contracts it has with its dealers.

h. Denies the allegations in paragraph 23H.

18. Denies the allegations in paragraphs 24, 25 and 26.

FIRST AFFIRMATIVE DEFENSE

19. Alleges that plaintiff's complaint fails to state a claim against Textron upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. Alleges that neither the plaintiff nor any member of the alleged class has been injured in his business or property within the meaning of Section 14 of the Clayton Act (15 U.S.C. Section 15) by reason of any act of Textron alleged in the complaint.

THIRD AFFIRMATIVE DEFENSE

21. Alleges that plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to any act of Textron alleged in the complaint.

FOURTH AFFIRMATIVE DEFENSE

22. Alleges that plaintiff's action cannot be maintained as a class action for either damages or injunctive relief under Rule 23 of the Federal Rules of Civil Procedure for, inter alia, the following reasons:

a. The named plaintiff is not a proper representative of any "class" within the meaning of Rule 23; and

b. Any questions of law or fact raised by plaintiff are not common to the alleged class; and

c. The claims of the plaintiff are not typical of the claims of the alleged class; and

d. The named plaintiff will not fairly and adequately protect the interests of the alleged class; and

e. The prosecution of separate actions by individual members of the class would not create the risk of inconsistent or varying adjudications or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; and

f. Textron and other defendants have not acted, nor refused to act or will not act on grounds generally applicable to the class; and

g. The questions of law and fact common to the members of the class do not predominate over any questions affecting only individual members and the class action is not superior to other available methods for adjudication; and

h. The class action is entirely unmanageable; and

i. Plaintiff has made no showing of a willingness or ability to bear the costs of maintaining the class action under Rule 23, including the costs of notice.

FIFTH AFFIRMATIVE DEFENSE

23. The claims of plaintiff and members of the alleged class are subject to the four year statute of limitations set forth in Section 4(b) of the Clayton Act (15 U.S.C. Section 15b).

Wherefor, defendant Textron prays that this Court dismiss the pretended complaint against it, both as to plaintiff and the members of the alleged class, that plaintiff take nothing by this action, and that Textron have and recover its costs and disbursements herein, including a reasonable attorneys' fee, and that Textron obtain such other and further relief as the Court may deem just and proper.

Dated: June 27, 1975.

ROBINS, DAVIS & LYONS
By Elliot S. Kaplan
By James R. Safley
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

SEPARATE ANSWER OF DEFENDANT RADIOEAR CORPORATION TO COMPLAINT

(Title omitted in printing)

Defendant Radioear Corporation (Radioear), for its Separate Answer to the Complaint herein, alleges and states as follows:

AS A FIRST DEFENSE

1. Except as hereinafter specifically admitted or alleged, denies each and every allegation of the Complaint.

2. Denies that the definition of "hearing aid" set forth in Paragraph 1 is a proper one.

3. Admits that Plaintiff purports to bring this action as alleged in Paragraph 2 but denies the applicability of the statutory authority cited therein and any liability to the Plaintiff. Radioear further alleges that the subject area encompassed by Plaintiff's Complaint has been pre-empted. Thus, any injunctive relief would be inappropriate.

4. Denies the allegations of Paragraph 3 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and therefore denies them.

5. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 and therefore denies them.

6. Denies the allegations of Paragraphs 5, 6 and 8 and alleges that Plaintiff cannot properly maintain this action on her own behalf or as representative of any class pursuant to Rule 23 of the Federal Rules of Civil Procedure; that the alleged "class members" are not in a similar position to that alleged by Plaintiff; and that Plaintiff's claims are not typical of any class.

7. Denies the allegations of Paragraph 7 and alleges that there is no class whose rights involve common questions of law and fact which predominate over any questions affecting only individuals and that a class action is not superior to other methods for the fair and efficient adjudication of this action. Radioear further alleges, on information and belief, that separate, distinct and unique methods of operation, manufacture, distribution and sale by the various Defendants create or will create questions of law and fact which are not common among the members of any class and will not predominate over any such questions affecting individuals.

8. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 9, 10, 11 and 12 and therefore denies them.

9. Admits the allegations of Paragraph 13 except states that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that in 1970 it was "the seventh largest hearing aid manufacturer in the United States with sales in excess of $2 million, representing approximately four percent (4%) of the hearing aid market" and therefore denies the same. It further states that its principal place of business is in Peter Township, Washington County, Pennsylvania, and the post office address is McMurray, Pennsylvania 15317.

10. Denies the allegations of Paragraph 14 as they may relate to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as they may relate to the other Defendants herein and therefore denies them.

11. Admits the allegations of Paragraph 15 as to it except denies that it distributes and sells hearing aid products to selected retail dealers located throughout the United States and alleges to the contrary that it distributes and sells hearing aid products through its existing distribution system to any qualified retail dealer located throughout the United States who solicits or seeks such products. Radioear further denies that prior to May 1, 1974, it distributed or sold hearing aid products to selected retail dealers located throughout the United States, who then resold to the general public, and alleges to the contrary that it distributed hearing aid products by consignment so that no resale occurred. Radioear states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 with

respect to the other Defendants herein and therefore denies them.

12. Admits the allegations of Paragraph 16 as to it except denies that its hearing aids are shipped to selected retail dealers throughout the United States and alleges to the contrary that it distributes and sells hearing aids to any qualified retail dealer located throughout the United States through its existing distribution system. Radioear states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 with respect to the other Defendants herein and therefore denies them.

13. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 and therefore denies them.

14. Denies the allegations of Paragraph 18 as to it, and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and the alleged "new entrants in the market" and therefore denies them.

15. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 19 and therefore denies them.

16. Denies the allegations of Paragraphs 20 and 21 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein, the alleged "other persons acting for each of them" and the alleged "co-conspirators" and therefore denies them.

17. Denies the allegations of Paragraph 22 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and therefore denies them.

18. Denies the allegations of Paragraph 23.

19. Denies the allegations of Paragraph 24 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of such allegations as to the other Defendants herein and the alleged "co-conspirators" and therefore denies them.

20. Denies the allegations of Paragraph 25 as to it and states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 as to the Plaintiff, the alleged "members of the class," the other Defendants herein and the alleged "co-conspirators" and therefore denies them.

21. Denies the allegations of Paragraph 26 as to it and specifically denies that it has ever concealed or sought to conceal any of its activities or policies by "elaborate schemes including the resort to secrecy to avoid detection." Radioear asserts each and every statute of limitation applicable to Plaintiff's alleged cause of action or causes of action. Radioear further states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26 as to the Plaintiff, the alleged "other members of the class" and the other Defendants herein and therefore denies them. Alleges further that the words beginning after the word "until" and preceding the word "on" in Lines 4 and 5 of Paragraph 26 are redundant, irrelevant, immaterial and should be stricken.

AS A SECOND DEFENSE

22. Alleges that Plaintiff's Complaint fails to state a claim against it upon which relief can be granted.

AS A THIRD DEFENSE

23. Alleges that service of process on it was insufficient.

AS A FOURTH DEFENSE

24. Alleges that this Court lacks jurisdiction over its person.

AS A FIFTH DEFENSE

25. Alleges that Plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to the matters complained of in her Complaint.

AS A SIXTH DEFENSE

26. Alleges that neither Plaintiff nor her attorneys satisfy the requirements and standards of Rule 23 of the Federal Rules of Civil Procedure for the bringing and maintaining of class actions.

AS A SEVENTH DEFENSE

27. Alleges that this action is not a proper class action under Rule 23 of the Federal Rules of Civil Procedure.

AS AN EIGHTH DEFENSE

28. Alleges that neither the Plaintiff nor any member of the alleged class has sustained any injury to their person or property by reason of any conduct on its part.

AS A NINTH DEFENSE

29. Alleges that Plaintiff's alleged cause of action or causes of action did not accrue within the four years next preceding the commencement of this action and therefore that such cause of action or causes of action are barred by the operation of Title 15, United States Code, Section 15(b). Radioear further alleges that Plaintiff has been guilty of laches in the filing of said cause of action or causes of action and therefore that she is estopped from proceeding herewith.

AS A TENTH DEFENSE

30. Radioear further alleges that any prayer for relief by Plaintiff except that for damages and then only by proof by her of actual monetary damages resulting directly from violation of law by this Defendant is moot.

WHEREFORE, Defendant Radioear Corporation prays that this Court dismiss the Complaint against it, that Plaintiff take nothing by this action, and that it have and recover its costs and disbursements herein, including attorneys' fees allowed by law.

Dated: June 26, 1975.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DISTRICT

ANSWER OF DEFENDANT BELTONE
ELECTRONICS CORPORATION

(Title omitted in printing)

Now comes defendant Beltone Electronics Corporation (hereinafter called "defendant Beltone"), acting by and

through its attorneys, James H. Levy and Julian R. Wilheim, and, by way of answer to plaintiff's complaint in the above-entitled action, alleges, as follows:

FIRST DEFENSE

1. The complaint fails to state a claim or a cause of action against defendant Beltone, upon which relief can be granted by this Court.

SECOND DEFENSE

1. As to the allegations contained in paragraph 1 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant alleges that the definition of "hearing aid" alleged therein is not correct or proper, insofar as its activities are concerned, and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

2. As to the allegations contained in paragraph 2 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has, at any time or in any manner, violated Section 1 of the Sherman Act or any other statute; specifically denies that plaintiff or anyone else ever has sustained, for any reason or in any manner, damages in any amount arising out of or from any activities of such defendant; specifically denies that plaintiff or anyone else is entitled, for any reason or in any manner, to injunctive relief against such defendant; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

3. As to the allegations contained in paragraph 3 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has transacted, at any time material herein, or now transacts business in the District of Minnesota within the meaning of the pertinent provisions of the Clayton Act; specifically denies that it has been found, at any time material herein, or now is found within the District of Minnesota within the meaning of the pertinent provisions of the Clayton Act; specifically denies that it has engaged in any illegal activities within the District of Minnesota or anywhere else; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

4. As to the allegations contained in paragraph 4 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

5. As to the allegations contained in paragraph 5 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 5 of the complaint, defendant Beltone alleges that plaintiff can not properly maintain this action pursuant to Rule 23, Federal Rules of Civil Procedure, on her own behalf or as a representative of any Class.

6. As to the allegations contained in paragraph 6 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant denies them. Further, by way of answer to paragraph 6 of the complaint, defendant Beltone alleges that the purported class members alluded to therein are not in a similar position to that alleged by plaintiff.

7. As to the allegations contained in paragraph 7 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 7 of the complaint, defendant Beltone alleges that there is no such class with rights involving common questions of law and fact predominating over questions affecting only individuals and that a class action is not superior to other methods for the fair and efficient adjudication of this action. Further, by way of answer to paragraph 7 of the complaint, defendant Beltone alleges, on information and belief, that the separate distinctive and singular methods and means of operation, manufacture, distribution, and sale of their products by the defendants named in the complaint create questions of law and questions of fact that are not common to members of the alleged class and that will not predominate over questions affecting individuals.

8. As to the allegations contained in paragraph 8 of the complaint, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they are deemed to be material allegations of fact, such defendant denies them. Further, by way of answer to paragraph 8 of the complaint, defendant Beltone

alleges that plaintiff's claims are not typical of any class and that the alleged "class members" are not in a position similar to that alleged by plaintiff.

9. As to the allegations contained in paragraph 9 of the complaint, defendant Beltone admits that it is named as a defendant in such complaint; admits that it is a corporation organized under the laws of the State of Illinois with its principal and sole place of business in Chicago, Illinois; admits that, since 1941, it has engaged, first, as Beltone Hearing Aid Co. and, later, as Beltone Electronics Corporation, in the manufacture and sale, at wholesale, of Beltone hearing aids; admits that, in its fiscal year 1970, its sales of Beltone hearing aids to retail hearing aid dealers authorized to sell Beltone products to the consuming public were in the aggregate of some $10,000,000.00; and, except as so admitted, qualified, or denied, states that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

10. As to the allegations contained in paragraph 10 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

11. As to the allegations contained in paragraph 11 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

12. As to the allegations contained in paragraph 12 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

13. As to the allegations contained in paragraph 13 of the complaint, defendant Beltone alleges that it does not have suf-

ficient knowledge or information to form a belief and, accordingly, denies them.

14. As to the allegations contained in paragraph 14 of the complaint, defendant Beltone alleges that they are argumentative, conclusions of law, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has conspired, in any manner or by any means, with any corporations, firms, or individuals with regard to any violations of any kind at any time; specifically denies that it has performed, by any means or in any manner, any acts or made any statements in any such conspiracy at any time; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

15. As to the allegations contained in paragraph 15 of the complaint, defendant Beltone admits that it now is engaged and, for sometime last past, has been engaged in the manufacture and sale, at wholesale, of Beltone hearing aids in the United States; admits that it now is engaged and, for sometime last past, has been engaged in the sale, at wholesale, of Beltone hearing aids in certain foreign countries; admits that it now provides and, for sometime last past, has provided repair service for Beltone hearing aids, both in warranty and without cost and also without warranty and at a wholesale charge, as the case may be, to retail hearing aid dealers authorized to sell, at retail, Beltone hearing aids to the consuming public; admits that it sells its products, at wholesale, to retail hearing aid dealers authorized to sell, at retail, Beltone products to the consuming public; admits that such authorized dealers are located at various and sundry places in the United States; admits that such authorized dealers, who

are, in each instance, independent businessmen, sell such Beltone products, at retail, to the consuming public; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

16. As to the allegations contained in paragraph 16 of the complaint, defendant Beltone admits that, in the course and conduct of its business of manufacturing and selling Beltone products, it ships or causes to be shipped, from its sole plant and place of business in Chicago, Illinois, to retail hearing aid dealers, authorized to sell Beltone products to the consuming public, such Beltone products ordered and purchased by such dealers from such defendant at such sole plant and place of business; admits that such dealers authorized to sell such Beltone products are located in various and sundry places in the United States; admits that it ships and has, for sometime last past, shipped its products in interstate commerce; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

17. As to the allegations contained in paragraph 17 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

18. As to the allegations contained in paragraph 18 of the complaint, defendant Beltone alleges that they are argumentative, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies them, insofar as they purport to pertain to it; admits that it now sells and, for sometime last past, has sold, at wholesale only, Beltone hearing aids to Beltone authorized retail hearing aid

dealers only; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

19. As to the allegations contained in paragraph 19 of the complaint, defendant Beltone alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

20. As to the allegations contained in paragraph 20 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, or any person acting for it, now is engaged or, at any other time, has been engaged in any combination or conspiracy in violation of Section 1 of the Sherman Act; in any combination or conspiracy in violation of Section 2 of the Sherman Act; or in any leases, sales, or contracts in violation of Section 3 of the Clayton Act; or in any violations of any other statutory provisions whatsoever; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

21. As to the allegations contained in paragraph 21 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative, conclusions of law, vague, and ambiguous and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it ever has done any act, by way of commission or omission, in furtherance of any offenses charged in the complaint; specifically denies that it ever has done any act, by way of commission or omission, for the purpose or intent of restrain-

ing, monopolizing, attempting to monopolize, or lessening competition in trade or commerce; specifically denies that it, acting either jointly with anyone else or severally, ever intended or acted to eliminate competition in hearing aids in the United States or anywhere else; specifically denies that it now has or ever had any monopoly power of any kind whatsoever; specifically denies that it, acting either jointly with anyone else or severally, ever intended to use any power it possessed to eliminate competition in hearing aids; specifically denies that it now has or ever had any economic power to eliminate competition in hearing aids; specifically denies that it, acting either jointly with anyone else or severally, ever intended to combine whatever economic power it possessed with that of anyone else to eliminate competition in hearing aids; specifically denies that it obtained substantial or unconscionable profits or any profits whatsoever for itself, at the expense of plaintiffs or anyone else, as a result of any restrictions upon competition in trade or commerce or in any other way whatsoever; specifically denies that it, acting either jointly with anyone else or severally, ever intended to obtain substantial or unconscionable profits for itself, at the expense of plaintiffs or anyone else, as a result of any restrictions upon competition in trade or commerce or in any other way whatsoever; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies them.

22. As to the allegations contained in paragraph 22 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that, in the course

or conduct of its business of manufacturing, distributing, selling, or repairing hearing aids or otherwise, it, acting either jointly with anyone else or severally, has, at any time material herein, used or pursued or now is using or pursuing a course of business behavior parallel to that of any other manufacturer or anyone else; specifically denies that, in the course or conduct of its business of manufacturing, distributing, selling, or repairing hearing aids or otherwise, it, acting either jointly with anyone else or severally, has, at any time material herein, pursued or now is pursuing any course of action alleged in subparagraphs A, B, C, D, E, or F thereunder; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

23. As to the allegations contained in paragraph 23 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone else or severally, has, at any time material herein, engaged or now is engaging in any acts or practices in furtherance of any courses of action alleged in paragraph 22 of the complaint; alleges that it has been, at all times material herein, engaged and now is engaged in the manufacturer of Beltone hearing aids for sale at wholesale only; alleges that it has been, at all times material herein, engaged and now is engaged in the sale of only new Beltone hearing aids; admits that it has, at all times material herein, sold and now is selling such new Beltone hearing aids only to authorized Beltone retail hearing aid dealers; admits that it has, at all times material herein, refused and now is refusing to sell such

new Beltone hearing aids to retail hearing aid dealers who are not authorized Beltone hearing aid dealers; admits that it has, at all times material herein, required and now is requiring that, before its one-year factory guarantee may be issued to a retail purchaser of a new Beltone hearing aid, a guarantee registration card must be sent to it by the authorized Beltone dealer making such retail sale and that such registration card states, among other things, the name and address of such retail purchaser and the Beltone model and serial number of the hearing aid; admits that it has, at all times material herein, encouraged and now is encouraging authorized Beltone retail hearing aid dealers to participate in its advertising programs; admits that it has, at all times material herein, denied cooperative advertising allowances to authorized Beltone retail hearing aid dealers who may wish to advertise competing brands of hearing aids in the same advertisement with new Beltone hearing aids; admits that it has, at all times material herein, engaged and now is engaging in substantial national advertising of new Beltone hearing aids; specifically denies that it has, at any time material herein, caused to be set or has set or now is causing to be set or now is setting the retail prices charged by authorized Beltone hearing aid dealers or anyone else for Beltone hearing aids; admits that it has, at all times material herein, sold and now is selling its factory repair parts for Beltone hearing aids only to authorized Beltone hearing aid dealers; admits that it has, at all times material herein, offered and now is offering its factory repair service for Beltone hearing aids only to authorized Beltone hearing aid dealers; admits that it has, at all times material herein, refused and now is refusing to sell its factory repair parts for Beltone hearing aids to anyone except authorized Beltone hearing aid dealers; admits that it has, at

all times material herein, refused and now is refusing to offer its factory repair service for Beltone hearing aids to anyone except authorized Beltone hearing aid dealers; admits the allegations contained in subparagraph G thereunder, including the several sub-subparagraphs set forth therein, only to the extent that they are borne out by the several authorized dealer agreements between such defendant and the several retail hearing aid dealers authorized to sell Beltone products to the consuming public and also by the pertinent records of such defendant; specifically denies that it, acting either jointly with anyone else or severally, has had, at any time material herein, or now has a policy of any kind to dissuade, discourage, or prohibit, by means of persuasion, pressure, harassment, coercion, or intimidation, sales of competitive brands of hearing aids by authorized Beltone hearing aid dealers; specifically denies that it, acting either jointly with anyone else or severally, has, at any time material herein, expressed, communicated, or emphasized or now is expressing, communicating, or emphasizing to authorized Beltone hearing aid dealers any policy on its part to dissuade, discourage, or prohibit, by means of persuasion, pressure, harassment, coercion, or intimidation, sales of competitive brands of hearing aids by such hearing aid dealers; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief and, accordingly, denies such allegations.

24. As to the allegations contained in paragraph 24 of the complaint, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do no require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it ever has formed or effectuated or now is forming or effectuating

any combination or conspiracy alleged in such complaint or otherwise; specifically denies that it ever has done or now is doing anything whatsoever with anyone else whatsoever in regard or in relation to any such purported combination or conspiracy; and, except as so admitted, qualified, or denied, denies such allegations.

25. As to the allegations contained in the first sentence of paragraph 25 of the complaint, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it has, at any time material herein, engaged or now is engaging, in any manner or by any means, in any acts or practices whatsoever that are oppressive, coercive, unfair, or anticompetitive or that have the tendency or capacity of hindering, suppressing, or eliminating competition and, except as so admitted, qualified, or denied, denies such allegations.

26. As to the allegations contained in the second sentence of paragraph 25 of the complaint, including the several subparagraphs thereunder, defendant Beltone alleges that they are argumentative and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone or severally, ever committed or now is committing any offenses alleged in such complaint; specifically denies that it, acting either jointly with anyone or severally, ever caused or now is causing any intended or actual effects such as it is sought to be alleged in subparagraphs A through M, inclusive, thereunder; and, except as so admitted, qualified, or denied, alleges that it does not have sufficient knowledge or information to form a belief

and, accordingly, denies such allegations. Further by way of answer to subparagraph L in the second sentence of paragraph 25 of the complaint, defendant Beltone specifically denies that it, acting either jointly with anyone or severally, ever has damaged or now is damaging plaintiff or anyone else to the extent or in the manner or by the means alleged therein or to any other extent or in any other manner or by any other means. Further, by way of answer to subparagraph M in the second sentence of paragraph 25 of the complaint, defendant Beltone specifically denies that it, acting either jointly with anyone or severally, ever committed or now is committing any offenses alleged in such complaint and specifically denies that it, acting either jointly with anyone or severally, ever has damaged or now is damaging plaintiff or anyone else to the extent or in the manner or by the means alleged therein or to any other extent or in any other manner or by any other means.

27. As to the allegations contained in paragraph 26 of the complaint, defendant Beltone alleges that they are vague, ambiguous, argumentative, and conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, such defendant specifically denies that it, acting either jointly with anyone or severally, ever engaged or now is engaging in any unlawsul conspiracy or activities; specifically denies that it, acting either jointly with anyone else or severally, ever adopted or now is adopting any scheme whatsoever to avoid detection of any such conspiracy or activities; and, except as so admitted, qualified, or denied, denies such allegations.

28. Defendant Beltone denies, generally and specifically, each and every material allegation of fact contained in the complaint not hereinbefore admitted, qualified, or denied.

FIRST AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that neither plaintiff nor any member of the purported class has been injured in his or her business or property within the meaning of Section 14 of the Clayton Act or any other statute by reason or as a result of any act of such defendant alleged in the complaint or otherwise.

SECOND AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that plaintiff is without standing to sue either in her own behalf or as a representative of any purported class with regard to any act of such defendant alleged in the complaint or otherwise.

THIRD AFFIRMATIVE DEFENSE

1. Defendant Beltone alleges that plaintiff's action can not be maintained as a class action for either damages or injunctive relief under Rule 23 of the Federal Rules of Civil Procedure for, among other things, the following reasons:

(a) Plaintiff Reiter, the named plaintiff in the complaint, is not a proper representative of any "class" within the meaning of Rule 23, Federal Rules of Civil Procedure;

(b) Any questions of law or fact raised by plaintiff herein are not common to the alleged class;

(c) Plaintiff's claims are not typical of the claims of the alleged class;

(d) Plaintiff will not fairly and adequately protect the interests of the alleged class;

(e) The prosecution of several actions by individual members of the purported class would not create the risk of inconsistent or varying adjudications or the risk of adjudications with regard to individual members of such class, which would, as a practical matter, be dispositive of the interests of other

members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(f) Defendant Beltone and the other defendants named herein have not acted or refused to act and they will not act on grounds generally applicable to the purported class;

(g) The questions of law and fact common to the members of the purported class do not predominate over any questions affecting only individual members thereof and the class action is not, in the attendant circumstances, superior to the other available methods for adjudication;

(h) This purported class action is entirely unmanageable; and

(i) Plaintiff has made no showing of either willingness or ability to bear the costs of maintaining a class action under Rule 23, Federal Rules of Civil Procedure, including, but not limited to, the costs of notice.

FOURTH AFFIRMATIVE DEFENSE

1. The claims of plaintiff and any members of the purported class are barred by application of the four-year statute of limitations set forth in Section 4(b) of the Clayton Act and also they are estopped from proceeding herein by reason of laches in the filing of the complaint and the causes of action alleged in the complaint.

WHEREFORE, defendant Beltone prays that this Court enter an Order and Judgment herein dismissing, with prejudice, the complaint against it, insofar as both plaintiff and members of the purported class are concerned, and ordering that plaintiff take nothing by this action and such defendant have and recover its costs and disbursements herein, including reasonable attorneys' fees, and granting to such defendant

such other and further relief, as to the Court shall seem meet, just, and proper in the premises.

Dated: May 10, 1976.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DAHLBERG ELECTRONICS, INC.

(Title omitted in printing)

Dahlberg Electronics, Inc. (hereinafter referred to as "Dahlberg"), by its undersigned attorneys, answers the plaintiff's numbered allegations of the complaint paragraphs seriatim as follows:

Dahlberg is without information sufficient to form a belief as to the truth of the allegations relating to the other defen-

dants and therefore denies same, except as specifically qualified below.

1. Declaratory, requiring no answer.

2. Jurisdiction is admitted, except that Dahlberg denies that it has violated any of the statutes as alleged.

3. Venue is admitted.

4. Lacking knowledge, denied.

5-8. Dahlberg denies that the alleged class is proper or that this action is maintainable as a class action under FRCP Rule 23.

9, 11-13. Admitted that Beltone Electronics Corporation, Sonotone Corporation, Textron, Inc. and Radioear Corporation are hearing aid manufacturers. Lacking information, the remaining allegations are denied.

10. Admitted, except that lacking information about market size, rank, and market share, the allegations that in 1970 Dahlberg was the third largest manufacturer of hearing aids, and that its sales represented approximately 8% of the hearing aid market, are denied.

14. Denied.

15. Denied, except that Dahlberg admits that it manufacturers, distributes, sells and repairs hearing aids in the United States, and that it believes the other defendants are similarly engaged.

16. Denied, except that Dahlberg admits that it ships hearing aids to dealers from its principle place of business, and that it believes the other defendants are similarly engaged.

17. Lacking information, denied.

18. Denied, except that Dahlberg admits to selling hearing aids to retail dealers for resale.

19. Lacking information, denied.

20-22. Denied.

23. Denied, except that with respect to paragraph 23(D), Dahlberg admits that from time to time it has advertised its brand of hearing aids, but denies that its advertising is "extensive"; that with respect to paragraph 23(G)(7), Dahlberg admits that its authorized dealer agreements contain a standard, 30-day termination clause; and that in relation to Paragraph 23(G)(8), Dahlberg admits that its authorized dealer agreements contain an option permitting it to repurchase its products. Dahlberg denies that any of these above acts or provisions are in any way unlawful, and, in all events, Dahlberg avers that the agreements speak for themselves.

24-26. Denied.

First Affirmative Defense

The Complaint fails to state a claim on which relief can be granted.

Second Affirmative Defense

Plaintiff lacks standing to sue Dahlberg for any of the alleged causes of action.

Third Affirmative Defense

Plaintiff and her attorneys do not meet the standards required under FRPC Rule 23 for this action to be sustained as a class action.

Fourth Affirmative Defense

Any claims which plaintiff alleges against Dahlberg in the complaint are barred by the applicable statutes of limitations, and by the doctrines of laches and estoppel.

Fifth Affirmative Defense

Injunctive relief against Dahlberg is not required and is inappropriate by reason of a consent order entered into by the Federal Trade Commission, effective August 14, 1974, in FTC Docket No. 8929.

WHEREFORE, defendant Dahlberg prays that this Court make and enter its judgment herein dismissing the complaint, awarding costs and attorneys fees to defendant Dahlberg, and granting such other and further relief as this Court shall deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ANSWER OF DEFENDANT
SONOTONE CORPORATION

(Title omitted in printing)

Defendant Sonotone Corporation ("Sonotone"), by its attorneys, for its answer to the complaint herein:

FIRST DEFENSE

1. Makes no response to paragraph 1, which is a definition proposed by plaintiff.

2. Denies each and every allegation contained in paragraph 2, except admits that the action purports to be brought under the statutes there referred to.

3. Denies each and every allegation contained in paragraph 3, except denies knowledge or information sufficient to form a belief as to those allegations insofar as they relate only to other defendants.

4. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4.

5. Denies each and every allegation contained in paragraph 5, except admits that the action purports to be brought on behalf of a class.

6. Denies each and every allegation contained in paragraph 6.

7. Denies each and every allegation contained in paragraph 7.

8. Denies each and every allegation contained in paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 9, except admits on information and belief that Beltone manufactures hearing aids.

10. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 10, except admits on information and belief that Dahlberg manufactures hearing aids.

11. With respect to paragraph 11, admits that it is a corporation organized under the laws of the State of New York, has its principal place of business in Elmsford, New York, and has manufactured hearing aids since about 1929, and otherwise denies knowledge or information sufficient to form a belief as to the allegations contained in that paragraph.

12. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12.

13. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 13, except admits on information and belief that Radioear manufactures hearing aids.

14. Denies each and every allegation contained in paragraph 14 insofar as any of said allegations are directed to it.

15. Denies each and every allegation contained in paragraph 15, except admits that it manufactures and sells hearing aids in various states of the United States and that it sells hearing aids to certain retail dealers, and except denies knowledge or information sufficient to form a belief as to the allegations insofar as they pertain only to other defendants.

16. Denies each and every allegation contained in paragraph 16, except admits that it ships hearing aids to retail dealers.

17. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 17.

18. Denies each and every allegation contained in paragraph 18, except denies knowledge or information sufficient to form a belief insofar as said allegations pertain only to other defendants.

19. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 19.

20. Denies each and every allegation contained in paragraph 20.

21. Denies each and every allegation contained in paragraph 21.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23.

24. Denies each and every allegation contained in paragraph 24.

25. Denies each and every allegation contained in paragraph 25.

26. Denies each and every allegation contained in paragraph 26.

SECOND DEFENSE

27. The complaint fails to state a claim on which relief can be granted.

THIRD DEFENSE

28. This Court lacks jurisdiction over Sonotone.

FOURTH DEFENSE

29. The purported service of process herein upon Sonotone was insufficient.

FIFTH DEFENSE

30. Plaintiff is without standing to sue either on her own behalf or as a representative of any class with respect to the matters alleged in the complaint.

SIXTH DEFENSE

31. Neither this litigation nor plaintiff satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, and hence the action may not be maintained as a class action.

SEVENTH DEFENSE

32. The alleged cause or causes of action are barred by the applicable statute of limitations and/or by the operation of Title 15, United States Code, Section 15(b).

EIGHTH DEFENSE

33. The claims asserted in the complaint are barred by laches and by estoppel.

NINTH DEFENSE

34. The claims alleged in the complaint are moot.

WHEREFORE, defendant Sonotone Corporation prays that this Court enter judgment dismissing the complaint against it, awarding costs and disbursements and attorneys' fees to defendant Sonotone Corporation, and awarding such other and further relief as to this Court may seem just and proper.

Dated: January 22, 1976.

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